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Supreme Court, U.S.
FILED
OCT 26 1992
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(3)

No. 92-338

In the Supreme Court of the United States

OCTOBER TERM, 1992

COOPER TIRE & RUBBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that petitioner discharged an employee in retaliation for engaging in solicitation on behalf of a union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 957 F.2d 1245. The decision and order of the National Labor Relations Board (Board) (Pet. App. A43-A50), including the decision and recommended order of the administrative law judge (ALJ) (Pet. App. A51-A110), is reported at 299 N.L.R.B. No. 145.

JURISDICTION

The decision of the court of appeals was issued on April 8, 1992. An amended judgment was entered on

June 1, 1992. Pet. App. A28-A29. A petition for rehearing was denied on July 8, 1992. Pet. App. A41-A42. The petition for a writ of certiorari was filed on August 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Cooper Tire & Rubber Company operates a tire manufacturing plant in Tupelo, Mississippi, that produces tires 24 hours per day, seven days per week. Pet. App. A3. Approximately 685 employees work at the Tupelo plant. *Ibid.* During their shifts, petitioner's employees receive a scheduled 20-minute paid lunch break, and they are also permitted shorter informal smoking breaks and breaks to use the restroom and water fountains as needed. *Ibid.* There is considerable open space between some sections of the production floor and the break areas of the plant. *Id.* at A62. For example, the farthest-situated tire-building machine is 600 feet from the break room. *Id.* at A61-A62. However, with the exception of the break room and locker rooms, petitioner treats the entire plant as a work area. *Id.* at A5.

Petitioner maintained a "no-solicitation" rule at Tupelo. The rule states (Pet. App. A5):

> No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during working time or in any working areas.
>
> Solicitations or distributions of printed matter by Cooper employees will be permitted only during non-working time and in non-working areas.

On June 29, 1988, petitioner discharged Mitzi Rye for allegedly violating the no-solicitation rule. *Id.* at A80. Rye, who worked in the tire-building department, was the first and only employee terminated by petitioner in connection with the company's no-solicitation policy. *Id.* at A14. The facts relating to Rye's discharge are as follows:

In September 1987, Rye and other employees had become dissatisfied with working conditions at the Tupelo plant and wanted to organize. Pet. App. A80. In October 1987, Rye began attending meetings of the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO (the Union). She became an in-plant organizer and signed an authorization card for the Union on October 21. *Ibid.* Two days later, on October 23, Rye was summoned from the production floor by her foreman for a meeting with Paul Smith, manager of the tire-building department, and Chuck Taylor, the director of industrial relations. *Id.* at A80-A81. Taylor told Rye that "they" had been "having meetings" and that Rye's name "kept coming up" as someone who was soliciting on company time. *Id.* at A81. Rye replied that Taylor "had been lied to." *Ibid.* Taylor apologized for the "misunderstanding," and informed Rye that solicitation was allowed only "in the cafeteria or the parking lot." *Ibid.*

After the October meeting with Smith and Taylor, Rye worked without incident until June 27, 1988. That day, Rye was ordered to report to Taylor's office to meet with Terry Jarzen, who had replaced Smith as manager of the tire-building department. Pet. App. A82. Jarzen told Rye that the company had received complaints that she was soliciting on company time

and on company property. Although Rye denied that she had solicited on company time, Jarzen suspended her from work and sent her home. *Ibid.* The same day, Taylor launched a "full investigation" into Rye's conduct by distributing a memorandum listing a series of questions to be asked employees concerning "the degree to which Mitzi violated our no-solicitation policy." *Id.* at A85. Between June 27 and June 29, four supervisors moved through the tire-building department and asked more than 150 employees the prescribed questions. *Id.* at A25. Among the questions was: "Has Mitzi ever asked you, during work time and in a work area, to sign an authorization card or attend meetings for any organization?" *Id.* at A86.

On June 29, Rye was called in from her suspension to meet with Taylor and Jarzen. Taylor informed Rye of petitioner's investigation and asked her whether she had solicited on company time and property. Pet. App. A87. Rye admitted that she had solicited on company property, but never on company time. *Ibid.* Taylor replied that five employees had given statements that she had solicited on company time, but he refused her request to see the statements. *Ibid.* Taylor then recommended Rye's discharge, and the plant manager accepted his recommendation. *Id.* at A88.[1]

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[1] Petitioner also disciplined employee Rocky Pickering by suspending him for three days for violating the no-solicitation rule. Pet. App. A99-A100. The court of appeals affirmed the Board's order to make Pickering whole for any loss of earnings and benefits resulting from his suspension, finding that the discipline was in retaliation for his union activities. *Id.* at A46,

2. The Union filed an unfair labor practice charge alleging, *inter alia*, that petitioner's no-solicitation rule was unlawful under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Union further alleged that petitioner's discharge of Rye violated Section 8(a)(3) and (1) of the Act,[2] and that the interviews conducted by petitioner's supervisors during its investigation of Rye's activities violated Section 8(a)(1). The Board's General Counsel issued a complaint and, after a hearing, the ALJ determined that petitioner's no-solicitation rule was overly broad under Section 8(a)(1) because it prohibited solicitation in non-working sections of the plant such as restrooms and smoking areas, and, additionally, because it prohibited solicitation in those non-working areas "used by employees on their non-working time as [*sic*] their way to the break room, smoking area, restrooms, water fountains or in and out of the plant." Pet. App. A63-A64. The ALJ found that petitioner had failed to demonstrate any substantial business or economic justification for banning solicitation in these areas. *Ibid.*

A16. Petitioner does not challenge the court's holding as to Pickering in its petition to this Court.

[2] Section 8(a)(3), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

The ALJ further ruled that the Rye discharge violated Section 8(a)(3) and (1) because it was based upon enforcement by petitioner of an invalid no-solicitation rule.[3] Pet. App. A89. The ALJ also determined that the discipline petitioner imposed on Rye violated Section 8(a)(3) and (1) for two additional reasons. First, the ALJ found that petitioner enforced its no-solicitation rule disparately against union solicitation, permitting other kinds of solicitation such as collection of money for gifts (Pet. App. A56-A66) and sales of Girl Scout cookies (*id.* at A77) with either no imposition of discipline at all or, at most, an informal admonition. *Id.* at A82, A88, A100. Second, the ALJ found that petitioner's reliance on Rye's alleged violation of the rule was "a pretext to retaliate against Rye for her union activity, and to warn others lest they suffer the same fate." *Id.* at A89. Finally, the ALJ determined that the interviews conducted by petitioner's supervisors constituted unlawful interrogation, in violation of Section 8(a)(1), because the interviewees were not informed that they need not answer the questions or assured that no

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[3] In so holding, the ALJ applied the principle enunciated by the Board in *Daylin, Inc.*, 198 N.L.R.B. 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). Under *Daylin*, if an employee is discharged for engaging in union solicitation in violation of a no-solicitation rule which is itself invalid under Section 8(a)(1), the discharge is unlawful, under Section 8(a)(3) and (1), unless the employer establishes that the solicitation interfered with the employee's own work or the work of other employees, and that this interference, rather than the violation of the rule, was the reason for the discharge. 198 N.L.R.B. at 281.

retaliatory measures would be taken against them. Pet. App. A104.

The Board affirmed the ALJ's findings and ordered petitioner, among other things, to rescind its no-solicitation rule, to reinstate Rye immediately with backpay, and to remove from its records any reference to the discipline given to her. Pet. App. A46.[4]

3. The court of appeals modified and enforced the Board's order. The court of appeals recognized that, in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 & n.10 (1945), this Court approved the Board's view, first announced in *Peyton Packing Co.*, 49 N.L.R.B. 828 (1943), that, absent special circumstances, an employer may not prohibit union solicitation by employees during non-working time, even though the employee is on company property. Pet. App. A6 & n.6. The court of appeals agreed with the Board that petitioner's no-solicitation rule was invalid under Section 8(a)(1) because it prohibited solicitation during break times in break areas (Pet. App. A9), and that petitioner had failed to demonstrate special circumstances justifying its rule (*id.* at A11). The court, however, amended the Board's order that petitioner rescind the rule, holding, instead, that petitioner could retain the rule "insofar as it allows solicitation in all break areas." *Id.* at A13. However,

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[4] One Board member noted that, since the ALJ correctly determined that petitioner violated Section 8(a)(3) and (1) by applying its no-solicitation rule in a discriminatory manner to discharge Rye, it was unnecessary to pass on the ALJ's additional finding that petitioner violated Section 8(a)(3) and (1) by disciplining her based on an invalid no-solicitation rule. Pet. App. A44 n.2.

the court required petitioner to modify the rule to allow solicitation "during any break times or in any break areas * * * when both the solicitor and solicitee are on break time, whether informal or scheduled, and are in a break area." *Id.* at A13 n.11.[5]

The court of appeals enforced in full the Board's order respecting Rye: it held that substantial evidence supported the Board's determination that petitioner violated Section 8(a)(3) and (1) by disciplining her. The court agreed with the Board that "Cooper pretextually used the alleged violations of its no-solicitation rule to discharge Rye" (Pet. App. A17), and that "the actual reason for Rye's discharge" was that she was "organizing a union." *Id.* at A21. The court of appeals also affirmed the Board's finding that petitioner selectively enforced the no-solicitation rule against union solicitation. *Id.* at A16-A17.

Lastly, applying the criteria enumerated in *Bourne* v. *NLRB*, 332 F.2d 47 (2d Cir. 1964), the court of appeals held that the interviews conducted by petitioner's supervisors did not constitute unlawful interrogation under Section 8(a)(1). Pet. App. A23, A26-A27 & n.23. Accordingly, the court deleted a provision of the Board's order requiring petitioner to cease and desist from interrogating its employees without proper safeguards against retaliation or

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[5] The court observed that the question whether a ban on solicitation during non-working hours in actual working areas is valid was not presented by this case. Pet. App. A10 n.9; see also *id.* at A2 n.2.

discrimination, and enforced the Board's order as so modified. *Id.* at A26-A27 & n.23.[6]

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the court of appeals, in affirming the Board's finding that Rye's discharge violated Section 8(a)(3) and (1), adopted "*sub silentio*" the principle enunciated by the Board in *Daylin, Inc., supra.* Petitioner asks this Court to "overturn[]" *Daylin* as inconsistent with the National Labor Relations Act. Pet. 11. Petitioner seriously mischaracterizes the decision below. The Board did invoke *Daylin,* but only as an alternative ground for holding that Rye's discharge violated Section 8(a)(3) and (1). The court of appeals, however, affirmed the Board's ruling as to Mitzi Rye solely on the alternative ground that petitioner applied its no-solicitation rule in a discriminatory manner and in retaliation against Rye for her union activity. Pet. App. A16-A19. Petitioner's challenge to that holding presents only an evidentiary issue that does not warrant further review by this Court. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951). In any event, we show below that substantial evidence supports the Board's finding that Rye was discharged in retaliation for her union activity. We

[6] The court of appeals also deleted two other provisions of the Board's cease and desist order in light of this ruling. However, since those provisions were based on the Board's finding of certain additional, independent Section 8(a)(l) violations which petitioner had explicitly declined to challenge in the court of appeals, the court, on the Board's motion (Pet. App. A30-A32), entered an amended judgment that reinstated them. *Id.* at A28-A29.

further show that, even if it were possible to characterize the decision below as having endorsed the Board's *Daylin* rule, petitioner's challenge to the validity of *Daylin* is jurisdictionally barred.

a. Substantial evidence supports the Board's finding that petitioner discharged Rye in retaliation for her union activity. Petitioner first expressed its concern about Rye's union activity on October 23, 1987, soon after organizing at Tupelo had commenced, when Smith and Taylor summoned Rye to Smith's office. Pet. App. A80. Taylor told Rye that her name "kept coming up" in management meetings and that unidentified employees had accused her of soliciting for the Union when she was supposed to be working. No other employee had ever been confronted in this manner regarding a violation of the no-solicitation rule. *Id.* at A81. Indeed, the evidence showed that company officials had disregarded many instances of solicitation that violated its no-solicitation policy where the solicitation was unrelated to union activity.[7]

Thereafter, in June 1988, shortly after petitioner's department managers had instructed the tire-builders on the night shift to inform management if they received a Union authorization card on company time (Pet. App. A19 n.16), Rye's supervisor pressured Dean

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[7] Contrary to petitioner's assertion (Pet. 10 n.4), the Board did not find that petitioner "uniformly enforced its no-solicitation rule against all solicitation, union and non-union alike." As stated by the court of appeals, "[t]he Board found that although Cooper almost always enforced its no-solicitation rule, it did so inconsistently and was much more harsh in its punishment as to Rye." Pet. App. A16-A17 (footnote omitted).

Johnson, one of Rye's co-workers, to give petitioner a statement alleging that Rye had solicited him in violation of company rules. Company officials wrote the statement for Johnson, "turning what might have been an innocuous exchange between Rye and Johnson into a clear violation" of the rule, and Jarzen suspended her on June 27 on the basis of that statement. *Id.* at A18-A19, A84. Following the suspension, Taylor launched an intensive investigation into Rye's union activities, but the evidence showed that he had already decided to discharge her based on Johnson's statement. *Id.* at A19, A90. The investigation yielded several additional written statements implicating Rye,[8] but petitioner did not conduct even the most superficial inquiry into the truth of those statements before discharging Rye on June 29. *Id.* at A87-A90. Given these facts, the court of appeals correctly held that substantial evidence supports the Board's finding that petitioner discharged Rye to retaliate against her for her union activity.

b. Even if it were possible to construe the court of appeals' decision as an adoption of the Board's *Daylin*

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[8] In these statements, a number of Rye's co-workers alleged that she had engaged them in conversations about the Union during work time. The court of appeals noted that these conversations "were only of a few second's [*sic*] duration and there was no evidence that any conversation resulted in or had the potential for disruption." Pet. App. A20. Contrary to petitioner's suggestion (Pet. 8-9), the court's comment does not demonstrate that it adopted *sub silentio* the Board's *Daylin* rule. Rather, the court referred to these facts as further evidence that petitioner applied its no-solicitation rule to retaliate against Rye for her union activity.

rule, review is not warranted because petitioner's challenge to the validity of *Daylin* is jurisdictionally barred. Although petitioner raised that challenge in the court of appeals, petitioner never raised it before the Board.[9] Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has shown no "extraordinary circumstances" excusing its failure to make this argument to the Board. Accordingly, the courts lack jurisdiction to consider petitioner's claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

2. Petitioner asserts (Pet. 12-14) that, because Rye solicited on behalf of the Union when she or the employee she solicited should have been working, she was not engaged in activity protected by Section 7 of the Act.[10] Therefore, according to petitioner, the

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[9] Before the Board, petitioner did not urge that *Daylin* be overruled; rather, it relied directly on that decision by attempting to show that it lawfully discharged Rye because her activity interfered with her work and the work of others. Petitioner also argued that its no-solicitation rule was less restrictive than the one at issue in *Daylin*. Pet. Bd. Br. 41-42 & n.47.

[10] Section 7, 29 U.S.C. 157, provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

Board had no authority to order petitioner to reinstate her. Petitioner's argument is without merit, for it is based on an incorrect factual premise: the ALJ found that Rye's discussions with co-workers about the Union had not occurred during working time. Pet. App. A89-A90 (finding that Rye had "not violated the [no-solicitation] rule").[11] Moreover, the Board's order reinstating Rye was proper inasmuch as substantial evidence supports its finding that petitioner discharged Rye, not for discussions while she or the solicitee were working, but in retaliation for organizing on behalf of the Union.

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and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[11] Contrary to petitioner's assertion (Pet. 6, 11), the court of appeals did not acknowledge that Rye solicited employees when she or others should have been working. The court of appeals noted that several employees had submitted written statements alleging that Rye solicited them on work time, but observed that those employees contradicted their own statements "in varying degrees" at the hearing, and that Rye's version of events differed substantially from theirs. Pet. App. A20 n.17. The court of appeals recognized that "the ALJ is in a unique position to evaluate the credibility and the demeanor of the witnesses," and accordingly deferred to the inferences drawn by the ALJ from the evidence. *Id.* at A21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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